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Ms Jodi Keall
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Financial System Division
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via email: beneficialownership@treasury.gov.au

Dear Ms Keall

Increasing Transparency of the Beneficial Ownership of Companies

The Australian Institute of Company Directors (**AICD**) is pleased to provide a submission in response to the Australian Government's consultation paper titled *Increasing Transparency of the Beneficial Ownership of Companies* (**Consultation Paper**).

The AICD is committed to excellence in governance. We make a positive impact on society and the economy through governance education, director education, director development and advocacy. Our membership of more than 39,500 includes directors and senior leaders from business, government and the not-for-profit sectors.

The AICD acknowledges the important role that transparency of the beneficial ownership of companies can play in assisting authorities to combat and prevent illicit activities such as tax evasion, money laundering, bribery, corruption and terrorism financing. The Australian Government's commitment to the integrity of the domestic and global financial systems through exploring enhancements to the rules governing disclosure of the beneficial ownership of companies is laudable.

The AICD is supportive of measures to improve beneficial ownership transparency that are effective, efficient and consistent with existing relevant regulation.

Approach to transparency measures

Australia's more than 2.4 million companies already grapple with a complex array of compliance costs associated with doing business in Australia. Many of these are small or family companies. Accordingly, while the government's desire to introduce some form of beneficial ownership register is commendable, it has the potential to impose additional administrative requirements and costs on every company in Australia, the vast majority of which are law-abiding corporate citizens. We urge the government to carefully assess the practical impact of any new measures on business and the economy, before they are adopted.

We also strongly recommend that the government undertake the following steps in deciding whether to introduce new disclosure requirements and, if so, their form:

- The government should undertake a cost-benefit analysis of any proposed reform to measure its effectiveness and efficiency, and disclose this analysis to the public;
- To ensure consistency across the various Australian laws and regulations impacting on companies, and to minimise the disruption caused to business by regulatory changes, the government should utilise (insofar as is possible) legal concepts and processes already existing under the *Corporations Act 2001* (Cth) (**Corporations Act**). The UK approach to beneficial ownership should not be seen as the only viable model for Australia;
- To the extent possible, the government should integrate new data with existing government databases (eg the ASIC Register), and consider the impact of any planned upgrades to those registers. We note, for instance, that the ASX is currently undertaking a significant redevelopment of the CHESS system, which might impact on reforms relating to listed companies;
- Should the government ultimately decide to implement a new stand-alone central register, technology should be utilised to ensure that the register is effective and efficient; and
- As this scheme is one which the government has committed to, any notices required to be filed with an authority should be free of charge. No Australian company should be charged or "taxed" for providing information to the government for the purposes of policing illicit activity.

Summary

Having regard to the principles of effectiveness, efficiency and consistency, the AICD has considered a number of the questions posed in the Consultation Paper. Our detailed comments on those questions are set out below. In summary though, the ACID is supportive of:

- An exemption for listed entities from any new beneficial ownership disclosure requirements, as those companies are already subject to a transparency regime that appears to satisfy the G20 High-Level Principles on Beneficial Ownership Transparency developed during the Australian Presidency of the G20;
- A definition of "beneficial ownership" that draws on concepts already well established in the Corporations Act, such as "related interests";
- The onus of providing "beneficial ownership" information being placed on the natural persons holding a relevant interest in a company's shares, rather than the company being obliged to ascertain or verify this information; and
- Amendments to the tracing regime for listed companies being explored to improve their efficacy.

Question 1

Should listed companies be exempt from any new requirements to report on its beneficial owners in light of existing obligations on such companies? If so, should an exception apply to companies listed on all exchanges or only to specific exchanges?

The AICD strongly endorses a listed company exemption from any new beneficial ownership reporting requirements. More specifically, the AICD supports an exemption for companies included in the official list of a "prescribed market" (as defined in section 9 of the Corporations

Act) operated in Australia. An exemption is warranted because these companies are already subject to an ownership transparency regime which, as the Consultation Paper acknowledges, results in the disclosure of "persons who have a significant level of control or ownership of the companies". The regime, which is imposed by the Corporations Act, includes the following elements:

- Substantial holdings notices – A person who, together with any "associates", has "relevant interests" in the shares of a "listed" company such that they hold, or cease to hold, 5 per cent or more of the voting power must provide the company and relevant market operator(s) with a "substantial holdings" notice (section 671B of the Corporations Act). The notice must include the name, address and "relevant interests" details of that person and any associates. Notices must also be provided for movements of at least 1 per cent in these holdings; and
- Tracing notices register – Listed companies must keep a register recording the "relevant interests" information received in response to tracing notices issued under Part 6C.2 of Corporations Act (section 672DA of the Corporations Act). Given the existence of the substantial holdings notice regime, tracing notice information typically pertains to relevant interests in securities of less than 5 per cent.

Question 2

Does the existing ownership information collected for listed companies allow for timely access to adequate and accurate information by relevant authorities?

The substantial holdings notices regime allows for timely access to share ownership information by relevant authorities. In the AICD's view, the information captured by this system is adequate because it reveals the holders of legal and beneficial interests of 5 per cent or more of the voting power of listed company shares. Importantly, relevant authorities (and members of the public) can access substantial holding information without charge.

Additionally, the legal ownership data on a listed company's share register and the beneficial ownership information on a tracing notice register can be accessed and, for a fee, a copy obtained (although some authorities may be entitled to the information at no charge).

Regulators, such as ASIC, have significant powers, including the power to compel the production of books or the examination of witnesses, which may assist in their collection of corporate ownership information.

Question 3

How should a beneficial owner who has a controlling ownership interest in a company be defined?

To ensure any new regime is easy to use and roll-out, we recommend (insofar as is possible) adopting a definition of "beneficial ownership" which draws on existing legal concepts and definitions in the Corporations Act. This approach would avoid the need for new legal concepts to be introduced, and then interpreted or judicially considered.

For instance, drafters of any legislation could draw on the concept of "relevant interests" found in the Corporations Act. The concept of "relevant interests" is extremely broad, and would in our view more than satisfy the Financial Action Task Force's transparency and beneficial ownership recommendations.

In addition, a sensible source to draw upon to frame "beneficial ownership" (as that term is used in the Consultation Paper) would be Australia's takeover rules. Under these rules, a person cannot acquire a "relevant interest" in voting securities of an entity that is subject to the takeover rules if it would result in any person's "voting power" exceeding 20 per cent. The AICD considers that any definition of "beneficial ownership" for unlisted companies should be set at no less than 20 per cent voting power or shareholding of a company. There may be sound policy and compliance arguments for the threshold to be higher.

Question 12

What obligations should there be on a company to make enquiries to ascertain who their beneficial owners are and collect the required information? What obligations should there be on the beneficial owners themselves?

The below suggestions relate to unlisted companies and are made on the basis that listed companies would be exempt from any new disclosure regime.

The AICD supports a disclosure model where a natural person (**RI Holder**) who holds relevant interests in a company (where those interests are above a certain prescribed threshold of say 20 per cent), bears the onus of reporting their relevant interests (**RI Information**) to the company. The RI Holder should also be required to update the company of any changes to their RI Information. Further, the legal holders of shares who do not hold the corresponding beneficial interests to those shares, should also be obliged to take reasonable steps to ascertain and provide to the company RI Information.

This approach would place the administrative and legal burden on the persons who are, practically speaking, best placed to know or ascertain RI Information. It would also minimise the cost and time implications of the new regime for companies.

A company should only be responsible for:

- Requesting RI Information by sending a notice (**RI Notice**) to legal shareholders who do not hold a corresponding beneficial interest, upon their entry onto the register of members and periodically (say annually) thereafter;
- Maintaining and updating a register (which could form part of the register of members) with the RI Information received (**RI Register**); and
- Reporting the RI Information received to ASIC in the same manner as the company reports other changes to the company's details.

We also recommend the government take the following comments into account when designing any new disclosure requirements:

- Companies should not be expected to verify the accuracy of RI Information received or "chase-up" shareholders who fail to respond to a RI Notice;
- Any obligation imposed on companies to send RI Notices should be time-specific, so that companies will not have to send more than one notice to shareholders within a given period (say, a 12 month period);
- Companies should have a period of 28 days within which to notify ASIC of new RI Information received by the Company. This period would align with the existing timeframe within which companies must notify ASIC of changes to their details;
- Any late fees charged by ASIC for failure to report RI Information should be no greater than the current fees charged for late changes to company details; and

- Companies should not be liable for unresponsive shareholders or inaccurate RI Information provided in response to an RI Notice.

Should the government expect companies to collect RI Information, appropriate sanctions should be put in place to secure compliance with the regime.

Question 13

Should each company maintain their own register?

While the AICD has concerns in relation to the administrative costs imposed on companies if they are obliged to maintain a register, it is difficult to imagine a system which does not involve, at least, the company holding this information and acting as a conduit to ASIC.

Question 15

Should a central register of beneficial ownership information also be established?

AICD does not believe a central register is necessary for the following reasons:

- The existing ASIC register could be leveraged to provide the equivalent functionality of a central register, particular if the government chooses to adopt the *de minimis* model suggested by the AICD in our response to question 12;
- In the context of listed companies, the substantial holding notification regime already provides publicly accessible beneficial ownership information; and
- There is a risk that the costs associated with the establishment and operation of a central register would be borne by companies and their shareholders under the "user pays" system currently being rolled-out by ASIC.

Question 28

What sanctions should apply to companies or beneficial owners which fail to comply with any new requirements to disclose and keep up to date beneficial ownership information?

The AICD recommends adopting sanctions which are consistent with those imposed by the Corporations Act with respect to similar matters, such as the failure to report a change of company details, or a failure to update a member register.

To the extent that such sanctions apply to directors or officers, the AICD strongly recommends the government ensure that such laws operate consistently with (at the very least) the Council of Australian Governments (COAG) principles on personal liability for corporate fault, agreed on 7 December 2010. The principles establish that where a corporation contravenes a statutory requirement, the corporation should be liable in the first instance and directors should not be liable for corporate fault as a matter of course.

Question 30

Do you see any practical implementation issues which companies or beneficial owners may face in collecting and reporting additional information?

Any "beneficial ownership" register ultimately requires the co-operation of the persons holding the controlling or beneficial interests. In the absence of sanctions similar to those adopted by the UK to compel compliance, it is unlikely that companies would be able to secure co-operation from shareholders. The UK model triggers liability when a shareholder fails to

respond to a notice. A similar model should be considered in Australia in order to ensure shareholder compliance with any new regime.

In addition, and contrary to some perceptions in the community, many unlisted companies already provide their shareholders with a large quantity of paperwork, including annual reports, voting papers and notices of meetings. As a consequence, there is a real danger that any proposed mechanism would simply add to the existing "swirl" of paperwork, resulting in a large swathe of incomplete or inaccurate information being held by companies. Consideration should therefore be given to a scheme which minimises the paperwork required, and is flexible enough to be suitable for all kinds of companies.

Question 36

Are the current tracing notice obligations sufficient to achieve the aim of providing timely access to adequate and accurate information to relevant authorities about those who control these companies??

Question 37

In your experience, are there issues or obstacles (specific to obtaining ownership information) which currently arise when using tracing notices? If so, what are those issues or obstacles??

While the AICD supports an exemption for listed companies as outlined above and a *de minimis* approach to any reform relating to this issue, we do recognise that there are some limitations to existing tracing laws. This is partly because the tracing laws contain provisions which essentially provide relief or shelter from the disclosure obligations. These provisions include:

- The requirement for the information to "only be disclosed to the extent to which it is known to the person"; and
- The relief from providing the information if the person proves the giving of the notice, requiring the information, to be "vexatious".

In addition, there are a number of hurdles and barriers which undermine the efficiency and effectiveness of the tracing laws. Some of these include:

- Legal structures which, although not specifically designed to facilitate such a purpose, segregate beneficial from legal ownership, with the legal registered owner not having direct access to information concerning the true beneficial owner;
- Financially engineered instruments (e.g. derivatives) where the entitlement to the underlying rights attaching to shares are "dismembered" or "partitioned and segregated" either on an ongoing basis or for a short temporal period (e.g. share lending for voting or short selling facilitations);
- Legal structures specifically designed to mask or shield the identity of the beneficial owner (e.g. corporations or trusts (including discretionary and "blind" trusts)); and
- Successively linked legal structures, perhaps even "shadowing" through global jurisdictions whose laws favour identify protection (including commonly known tax havens).

One consequence of these limitations is that, in some circumstances, ASIC or the company do not have timely access to current information in relation to beneficial ownership information where those "relevant interests" are less than 5 per cent of the voting power.

Accordingly, to improve the existing regime, the AICD recommends that the government consider whether the provisions referred to above could be modified to reduce the time and costs involved in issuing tracing notices. For example, the government could explore the possibility of amending section 672B(1A) of the Corporations Act so that a person who is given a direction must take "reasonable steps" or make "reasonable inquiries" to ascertain the full details of the information required to be provided under section 672B(1). Such a change may enhance the effectiveness of the tracing notice regime.

We hope our comments will be of assistance to you. If you would like to discuss any aspect of this submission, please contact Matt McGirr, Policy Adviser, on (02) 8248 2705 or at mmcgirr@aicd.com.au.

Yours sincerely

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